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IN THE

Supreme Court of the United S[illegible]

October Term, 1972
No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., SMITH-SCOTT CO., INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U.S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, all corporations,

Petitioners,

vs.

STATE OF UTAH, a body politic, *et al.*,

Respondents.

BRIEF FOR PETITIONERS.

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Petitioners,

vs.

STATE OF UTAH, a body politic, *et al.*,

Respondents.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the District Court, dated December 17, 1969, denying class action status to the instant action, is reported at 49 F.R.D. 17 (C.D. Calif. 1969) (A. 346-55; R. 349-57). The opinion of the District Court dated March 30, 1970, denying the motions of Respondents to intervene, is reported at 50 F.R.D. 99 (C.D. Calif. 1970) (A. 482-502; R. 447-65). The opinion of the Court of Appeals for the Ninth Circuit is reported at 473 F.2d 580 (dated January 31, 1973) (Petition for a Writ of Certiorari, Appendix D, at 33-39).

Jurisdiction.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). An opinion of the United States Court of Appeals for the Ninth Circuit in this case was first filed and entered December 11, 1972 (Petition for a Writ of Certiorari, Appendix E, at 40-48). Thereafter, a petition for rehearing was filed on December 22, 1972. On January 31, 1973, the opinion and judgment dated December 11, 1972, were withdrawn, the opinion and judgment dated January 31, 1973, were entered and the petition for rehearing was denied (Petition for a Writ of Certiorari, Appendix D at 33-39 and Appendix A at 1, respectively). The petition for *certiorari* was filed on March 2, 1973, within ninety (90) days of the aforesaid date of January 31, 1973. On May 7, 1973, this Court granted *certiorari* to review the judgment of the Court of Appeals.

Statutes, Federal Rules and Regulations Involved.

1. *United States Code,* Title 15, Section 15 (Clayton Act of October 15, 1914, c. 323, § 4, 38 Stat. 731);

2. *United States Code,* Title 15, Section 15a (Clayton Act of October 15, 1914, c. 323, § 4A, as added July 7, 1955, c. 283, § 1, 69 Stat. 282);

3. *United States Code,* Title 15, Section 15b (Clayton Act of October 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283);

4. United States Code, Title 15, Section 16b (Clayton Act of October 15, 1914, c. 323, § 5(b), 38 Stat. 731, as amended July 7, 1955, c. 283, § 2(b), 69 Stat. 283);

5. Rule 3, Federal Rules of Civil Procedure;

6. Rule 8, Federal Rules of Civil Procedure.

7. Rule 23(a), (b) and (c), Federal Rules of Civil Procedure; and

8. Rule 24(b), Federal Rules of Civil Procedure. (See A. 5-10).

Questions Presented for Review.

1. Whether, as held by the Ninth Circuit, the filing of an invalid class action abridges or modifies the substantive barring provisions of Section 5 of the Clayton Act.

2. Whether the decision of the Court of Appeals creates substantial problems in the administration of Rule 23 and deprives defendants of due process of law.

3. Whether the decision of the Ninth Circuit conflicts with the requirements of Rule 24(b), F.R.Civ. P.

Statement of the Case.

On May 13, 1969, the State of Utah filed a class action complaint against Petitioners [defendants below] in the United States District Court for the District of Utah, alleging a Sherman Act conspiracy in the sale of concrete and steel pipe and seeking treble damages for purchases of those products. The State of Utah purported to represent a class described as "those public bodies and agencies of state and local government in the State of Utah who are end users of pipe acquired from defendants, co-conspirators and others"[1] and "all other states in the Western Area, . . . which have not previously filed a similar action."[2] At the time Utah filed its class action complaint, however, only six or seven members of the purported class "had ever dis-

[1]A. 313; R. 317-18.

[2]A. 314; R. 318.

cussed with Utah's attorney the possibility of a pipe antitrust suit against * * * [Petitioners]."[3]

Utah's complaint alleged a price-fixing conspiracy among Petitioners continuing until the date of the filing of the complaint.[4] In fact, the present action is an extremely tardy tag-end appendage to and relies upon the same conspiracies alleged in the litigation commonly known as the "West Coast Pipe Cases" in which Respondents had every opportunity to join. Such cases were in litigation for more than 4 years and were widely publicized. By reason thereof, Respondents are charged with notice of their pendency. The tardy character of the motions to intervene is underscored by the history of this West Coast Pipe litigation. Such cases, more than 100 in number with approximately 350 claimants, included a group of class actions in which Respondents could have joined, and were pending between 1964 and 1968 in the various District Courts of the Ninth Circuit. The actions were consolidated for discovery under the Honorable Martin Pence, Chief Judge for the District of Hawaii. In such consolidated actions, Judge Pence entered an order that prospective interveners in the various class actions should file by March 31, 1966.[5]

The West Coast Pipe Cases grew out of five Government criminal actions initiated in March 1964 and terminated on June 19, 1964.[6] These actions were fol-

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[3]*State of Utah v. American Pipe and Construction Co., et al.*, 50 F.R.D. 99, 101 (C.D. Calif. 1970); A. 483; R. 448.

[4]A. 324; R. 327.

[5]A. 437; R. 492.

[6]Under the literal language thereof, the barring provisions of Section 5(b) of the Clayton Act should have been triggered by such termination of the Government criminal actions, since 5(b) provides:

"That *whenever* the running of the statute of limitations in

lowed by five Government civil actions filed under the False Claims Act[7] on June 23, 1964.[8] Thereafter, the Government civil actions were amended on October 28, 1964, to add a claim for injunctive relief under Section 4 of the Clayton Act.[9] The purpose of this amendment by the Government was to add a claim capable of tolling the statute of limitations (Section 5(b) of the Clayton Act)[10] as to private claims. On December 8, 1967, all defendants except American Pipe and Construction Company entered into consent decrees in the Government civil actions,[11] which in light of decisions from the Ninth Circuit and other jurisdictions would have caused the statute of limitations to run one year thereafter.[12] On May 24, 1968, the actions against American were also terminated.[13]

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respect of a cause of action arising under section 15 of this title is suspended hereunder, *any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.*" (Emphasis added).

[7]31 U.S.C. §§ 231-33.

[8]A. 72-139; R. 70-134.

[9]15 U.S.C. § 15a; A. 140-231; R. 136-228.

[10]15 U.S.C. § 16(b).

[11]A. 232-83; R. 230-84.

[12]*See, Manny v. Warner Bros. Pictures,* 116 F.Supp. 807, 809-10 (S.D. Cal. 1953); *Century Hardware Corp. v. Powernail Co.,* 282 F.Supp. 223, 228-29 (E.D. Wis. 1968); *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.,* 193 F.Supp. 401, 403-05 (S.D. N.Y. 1961); *Grengs v. Twentieth Century Fox Film Corp.,* 232 F.2d 325, 333 (7th Cir. 1956), *cert. denied,* 352 U.S. 871 (1956); *Tague v. Balaban,* 146 F.Supp. 356, 361 (N.D. Ill. 1956); and *Sun Theatre Corp. v. RKO Radio Pictures,* 213 F.2d 284, 292 (7th Cir. 1954).

[13]American was not a party to two of the Government civil actions—those involving steel large and small diameter pressure pipe. Accordingly, those two actions were terminated for all purposes with respect to all defendants on December 8, 1967, and the statute of limitations with respect to claims relating to those types of pipe ran long before the State of Utah filed its

(This footnote is continued on next page)

Prior to the events which gave rise to the instant appeal Judge Pence held, in *Maricopa County v. American Pipe and Construction Co., et al.*, 303 F.Supp. 77 (D. Ariz. 1969) that the statute of limitations as to private claims arising out of the Western Pipe Conspiracy was tolled throughout both the Government criminal actions and the Government civil actions and remained tolled as to each co-conspirator until May 24, 1969, one year following the termination of the Government civil actions as to the last defendant, American. The effect of such decision was to abrogate the defendant by defendant rule which had previously been enunciated by a district court in the Ninth Circuit[14] in the only decision by any Court in the Ninth Circuit which had considered such question. The *Maricopa* decision also constituted a holding that successive noncontemporaneous government actions will suspend the extension of the statute of limitations beyond the one year period of Section 5(b) of the Clayton Act even though such statute explicitly refers to a "single government proceeding." By virtue of that decision, the statute of limitations as to private claims arising out of the Western Pipe conspiracy was greatly lengthened, and Utah was permitted to file its complaint on May 13, 1969, more than six years after the termination of the conspiracy complained of and only eleven days prior to the date

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complaint herein. This same point was argued to the United States Court of Appeals for the Ninth Circuit, in a parallel case, *Maricopa County v. American Pipe and Construction Co., et al.*, 303 F.Supp. 77 (D. Ariz. 1969). It refused to pass on the point, holding that it had not been raised below, but reserved to appellants therein the right to assert the point before the District Court [431 F.2d 1145 (9th Cir. 1970)] .In the instant case, the same point was argued to the District Court [R. 559-64]. It did not pass on the point because it decided on broader grounds the issues involved in this appeal.

[14] *Manny v. Warner Bros. Pictures, supra*, n. 12.

on which the enlarged period of limitations finally ran. During those eleven days, none of the members of the purported class alleged by Utah filed any actions or motions or in any way made their presence known to the District Court.

On August 28, 1969, the Judicial Panel on Multidistrict Litigation transferred the instant case from the District of Utah to the Central District of California for assignment to Judge Martin Pence, Chief Judge of the District of Hawaii, for consolidated pretrial proceedings pursuant to 28 U.S.C. Section 1407.[15] On December 4, 1969, Judge Pence, pursuant to Petitioners' motion dated November 14, 1969, entered an order that the instant case may "* * * not be maintained as a class action and, no parties having joined therein, the class action, * * * in all respects stands terminated as of May 13, 1969, the date of the filing of the complaint herein."[16] The order was based on a finding "that the first prerequisites to a class action have not and cannot here be met."[17] That order found that: "Numerous other parties, who would clearly qualify as members of the general class alleged by plaintiffs * * * [have] heretofore commenced actions on their own behalf. * * * The entities alleged by plaintiff to be members of the class described in the Complaint, in fact, are not so numerous that joinder of all such entities is impracticable," and "[a] class action has heretofore been shown to be inferior to other available methods for the fair and efficient adjudication of the instant controversy. * * *"[18] Such findings were made in the

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[15] *In re West of the Rockie Concrete Pipe Antitrust Cases*, 303 F.Supp. 507, 508 (J.P.M.L. 1969).

[16] A. 345; R. 347.

[17] A. 353; R. 356.

[18] A. 344-45; R. 346-47.

light of the series of class actions filed in the West Coast Pipe Cases in which various plaintiffs purported to represent all potential claimants, including the Respondents herein.

At the time of Judge Pence's decision respecting the class action, none of the members of the purported class had evidenced any interest in Utah's suit. Subsequent to that decision, on December 12, 1969, and subsequently on December 29, 1969, as a result of solicitation by Utah,[19] some seventy-odd towns, cities and other government entities [Respondents] moved to intervene as plaintiffs in this action pursuant to Rule 24(a)(2) or Rule 24(b)(2) of the Federal Rules of Civil Procedure.[20] Petitioners opposed such intervention, and, following a hearing, the District Court on March 30, 1970, denied the alternative motions. It specifically found that Respondents were not entitled to intervene as a matter of right pursuant to Rule 24(a)(2) because they had no legitimate interest in the outcome of Utah's action.[21] It refused to grant permissive intervention pursuant to Rule 24(b)(2) on two grounds: first, because "* * * to permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case"[22] and, second, because any attempt to avoid the bar of Section 5(b) of the Clayton Act by means of the Federal Rules of Civil Procedure, would unlawfully abridge substan-

[19]A. 482; R. 447. 50 F.R.D. at 100.
[20]A. 355-87; R. 359-88.
[21]A. 486; R. 451. 50 F.R.D. at 102.
[22]A. 486; R. 451. 50 F.R.D. at 102.

tive rights of antitrust defendants.[23] It did, however, indicate that neither ground would apply to the assertion of claims arising during the four-year period preceding the filing of the motions to intervene and that intervetion would be granted for the limited purpose of asserting such claims.[24]

In order to secure a final appealable order [and, no doubt, in heed of the District Court's advice that pursuit of post-1962 claims would be an expensive and fruitless venture], Respondents amended their proposed complaint in intervention so as to eliminate any claim as to the four-year period preceding December 12, 1969. Thereupon, Respondents took an appeal from the denial of their motions to intervene.

On December 11, 1972, the Ninth Circuit, by a divided court, reversed the decision of Judge Martin Pence denying intervention, basing such decision primarily upon the fact that "the record persuasively indicates forbearance [to sue in reliance upon the class

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[23]A. 497; R. 460. 50 F.R.D. at 108.

Previously, in its Findings of Fact respecting the class action, the Trial Court made the following findings:

> "1. Numerous other parties, who would clearly qualify as members of the general class alleged by plaintiffs, have heretofore commenced actions on their own behalf. Between August 1964 and April 1966, over 100 separate actions allegedly arising out of this same 'Western Pipe Conspiracy' were filed in eight different United States District Courts of the Ninth Circuit. In three actions members of an alleged class in those actions purported to represent the same broad class of 'public end-users' which plaintiffs herein claim to represent, and in another action, the State of California claimed to represent all of the public end-users within said State. *All the aforesaid actions and resulting settlements were widely publicized and potential plaintiffs, throughout the 'Western area,' should have had notice thereof prior to the termination, during 1967, 1968 and 1969, of said actions.* [A. 344; R. 346-47] (Emphasis added).

[24]A. 484, n. 2; R. 449, n. 2. 50 F.R.D. at 101, n. 2.

action] as to all appellants."[25] In a Petition for Rehearing, Petitioners pointed out that the Ninth Circuit had erroneously assumed the existence of reliance by would-be class members, an assumption wholly unsupported by the record. Thereafter, on January 31, 1973, the earlier opinion of the Ninth Circuit was withdrawn and, by a divided court, the Ninth Circuit again reversed the order of the District Court denying intervention by Respondents pursuant to Rule 24(a), F.R. Civ.P. This time, however, the Ninth Circuit's opinion eliminated the previous factual error by deleting therefrom any reference to the fact of reliance by would-be class members and eliminating any requirement that such reliance be shown by would-be class members in order to toll the statute of limitations.

The effect of the Ninth Circuit's decision is to repeal by judicial mandate the barring provisions of Section 5(b) of the Clayton Act and to contravene both the express prerequisites to the existence of a class action under Rule 23 and the requirements of Rule 24(b), F.R.Civ.P. In ruling that intervention should have been granted pursuant to Rule 24(b), the Ninth Circuit held that the filing of a class action, even an invalid one, tolls the running of Section 5(b) as to members of the "non-class." Although the decision of the Ninth Circuit upheld the District Court's denial of intervention as a matter of right pursuant to Rule 24(a), the practical effect of the Ninth Circuit's decision is to render intervention under Rule 24(b) mandatory rather than discretionary. The crux of such decision is that whenever a class action is filed, anyone who is purportedly a member of that class must be permitted to

[25]Petition for a Writ of Certiorari, Appendix E, at 47.

intervene even though no class is found to exist under Rule 23 and the alleged class members would otherwise be barred by the statute of limitations from filing suit.

Moreover, the Ninth Circuit, in announcing its new rule of mandatory intervention pursuant to Rule 24(b), chose to ignore altogether the discretionary portion of the District Court's ruling wherein it denied permissive intervention for a variety of reasons: the untimeliness of the petition to intervene; the serious prejudice to the rights of Petitioners if intervention were allowed; and the complication and delay of discovery that would result by allowing intervention.

The decision below is at odds with the principles established by this Court, and establishes an erroneous standard for the district courts of the Ninth Circuit to follow in application of the Federal Rules of Civil Procedure.

Summary of Argument.

Despite the unchallenged decision of the District Court that there never was a class action, the Ninth Circuit, absent logical rationale or judicial precedent, held that a non-existent class action tolled the statute of limitations for purported class members. The decision converts non-claimants and non-class members (there was no Rule 23 class) into parties before the court on the date of the Utah complaint based solely on the fact that the Utah complaint contained class action allegations. This exalts form over substance. The District Court correctly held there was no class and since "there never was a class," there could not be a claim of vicarious filing by the purported class members.[28] By con-

[28]A. 499; R. 462. 50 F.R.D. at 108.

trast, the Ninth Circuit rejected the elementary concept that "[a] class action does not exist merely because it is so designated by the pleadings,"[27] and it ignored the criteria of Rule 23 which establishes prerequisites which must be met to establish a class action. Conceptually, this makes no sense. If an individual were to file an antitrust claim on his own behalf, no other persons with similar or common claims could relate a later filed complaint back to the first action to toll the statute of limitations where there never was a class. Merely adding the magic words alleging a class should not work to abrogate a statute of limitations enacted by the Congress.

By holding that purported class members are before the Court despite the failure to meet the prerequisites of Rule 23, the Ninth Circuit's opinion herein contravenes the provisions of Rule 23 established by the Supreme Court and abrogates the substantive barring provisions of Section 5(b) of the Clayton Act enacted by Congress. It is only in cases where the District Court determines that the action may be maintained as a class action that class members may be held to be before the Court provided that such members comply with Section 5(b) of the Clayton Act and with the requirements of due process as exemplified by Rule 8, F.R.Civ.P. Such prerequisites are not met by Respondents. It is clearly impermissible for the Ninth Circuit to amend rules of procedure promulgated by the Supreme Court; it is equally impermissible for any court to abridge any substantive statute of Congress by means of rules of procedure. The Enabling Act which authorizes the Su-

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[27] *Rossin v. Southern Union Gas Company*, 472 F.2d 707, 712 (10th Cir. Opinion of January 17, 1973). *Accord: Cash v. Swifton Land Corporation*, 434 F.2d 569, 571 (6th Cir. 1970).

preme Court to promulgate the Federal Rules (28 U.S.C. 2072) expressly prohibited the Court from promulgating rules which "abridge, enlarge or modify any substantive right."

There is no sound basis for finding any relation back concept whereby interveners can relate their petitions back to the date of filing of the State of Utah complaint. As held by the District Court:

> "The above conclusion carries even more thrust here, where this court has determined that the action may not be maintained as a class action. The class action, in the words of the Committee, has been 'stripped of its character as a class action.' Since there never was a class, the members of the 'class' cannot claim that they started their suits, vicariously, before the tolling period expired. There being no class, there is no connecting link available, even for the 'relying seven', for attachment of any 'relation back' hook."[28]

Since there never was a "class" the Ninth Circuit's decision cannot be supported on the basis of any vicarious filing rationale as recognized in some cases involving valid class actions. No class members could be solicited or conscripted with or without their consent since no class action existed. It therefore remains incomprehensible how there could be vicarious filing or relation back or presence before the Court of purported class members at the time of the Utah filing.

The Court of Appeals' decision raises serious constitutional questions as to the proper powers of the courts in adversely affecting substantive rights under the guise of

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[28]A. 498-99; R. 462-63. 50 F.R.D. at 108.

implementing procedural rules. The Federal Rules cannot be converted into statutory amendment of the statute of limitations which is the practical effect of the Ninth Circuit decision. That Court's opinion in abridging Petitioners' rights by not requiring the timely filing of a pleading that conforms to the requirements of Rule 8, F.R.Civ.P., deprives the Petitioners of due process of law. In the interest of proper administration of justice by the federal judiciary, the Supreme Court should establish a clear precedent which requires that all persons seeking to present claims before the federal courts individually satisfy the substantive requirements of any applicable statutes of limitation in class and non-class actions alike.

The decision of the Ninth Circuit also does violence to the express provisions of Rule 24, F.R.Civ.P. Rule 24(b) which provides that intervention will not be allowed except upon timely application and a showing that intervention will not prejudice the rights of the defendants. The decision of the Ninth Circuit paid no heed to such requirements of the Rule or to the findings of the District Court. Moreover, in ruling upon Respondents' motions to intervene, the District Court properly considered a variety of other factors pertinent to intervention and on the basis of such factors exercised its discretion to deny permissive intervention. The Ninth Circuit clearly erred in reversing such discretionary ruling inasmuch as it did not find any abuse of discretion by the District Court.

ARGUMENT.

I.

The Filing of an Invalid Class Action Could Not and Did Not Abridge, Enlarge or Modify the Substantive Barring Provisions of Section 5(b) of the Clayton Act.

In its decision respecting the class action, the District Court found "that the first prerequisites to a class action have not and cannot here be met."[29] On December 4, 1969, the Court entered an order that the instant case "* * * may not be maintained as a class action and, no parties having joined therein, the class action, * * * in all respects stands terminated as of May 13, 1969, the date of the filing of the Complaint herein."[30]

Nevertheless, the Ninth Circuit reversed the District Court's order denying leave to intervene and found the statute of limitations satisfied for purported class members by the filing of an invalid class action:

> "* * * [W]e hold that as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits. The requirements of § 5(b) were then met."[31]

Anomalously, the Ninth Circuit Court found the purported class members to be before the District Court

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[29]A. 353; R. 356. 49 F.R.D. 17, at 21.

[30]A. 345; R. 347.

[31]Petition for a Writ of Certiorari, Appendix D, at 38.

for purposes of relating their motions to intervene back to the date of the filing of Utah's complaint, despite the fact that the action was not maintainable as a class action. The decision is predicated upon a premise which is self-contradictory, *i.e.*, that even though the statutory prerequisites to a class action are not met, the claims of parties who are not authorized to be before the Court pursuant to Rule 23 were, in fact, before such Court pursuant to such Rule. No authority has been cited by the Court for this astounding proposition. We have heretofore noted the finding of the trial court[32] "that the first prerequisites to a class action have not and cannot here be met." The Court of Appeals did not and could not elucidate how Respondents were before the Court when they were unable to meet such prerequisite of Rule 23. Indeed, it is well settled that legal consequences flowing from the proposed class action "must be found within the four corners of amended Rule 23 * * *."[33] The Second Circuit held in response to the argument that social purposes compelled a liberal interpretation of Rule 23 as follows:

> "* * * But none of these considerations justify disregarding, nullifying or watering down of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions, including oppressions by those whose intentions may be above reproach.

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[32]A. 353; R. 356.

[33]*Eisen v. Carlisle* (2d Cir. Op. May 1, 1973) ATRR No. 612, May 8, 1973 at F-1, F-4.

> * * * Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that 'such rules shall not abridge, enlarge or modify any substantive right.' "[34]

A. Judicial Decisions on the Effect of Instituting a Class Action on the Running of the Statute of Limitations.

Under the old Rule 23, the lower courts were divided on the question of whether the filing of a valid spurious class action permitted intervention by class members to relate back to the filing of the suit and thus avoid the bar of the statute of limitations.[35] *Union Carbide & Carbon Corp. v. Nisley*[36] is the leading case for the proposition that a proper spurious class action permits all class members to relate their claims back to the original complaint.[37] Other courts have held that each class member must be able to satisfy the statute of limitations by individual reference to their own cause of action and without relating to any other complaint. Thus, in *Pennsylvania Co. v. Insurances,*

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[34]*Eisen v. Carlisle & Jacquelin,* 1973 Trade Cases, ¶ 74,476, at page 94,117.

[35]Apparently the commencement of a true class suit tolled the statute as to all class members on the theory that the members of the class would be bound by any judgment; all true class members were deemed to be before the court from the inception of the suit. *See,* MOORE'S FEDERAL PRACTICE, Vol. 33, ¶ 23.12, at 23-2918-19, and cases there cited.

[36]300 F.2d 561 (10th Cir. 1961).

[37]The Tenth Circuit has followed the rationale of the *Nisley* decision on tolling under the new Rule 23 even where the district court finds no class action but the Court of Appeals reverses and finds that there was a properly constituted class action. *Esplin v. Hirschi,* 402 F.2d 94 (10th Cir. 1968).

etc. Deckert,[37a] the court held that even as to a properly pleaded spurious class action, additional plaintiffs could not intervene after the statute of limitations had run as to them. *Accord, P. W. Husserl, Inc. v. Newman.*[37b]

In no instance did any court under the old rule ever find that there was a tolling of the statute or a vicarious relation back where there had been no proper class action, whether there were true or spurious class allegations in the original complaint.[38]

Under the new Rule 23, so far as we are aware, there have been only two district court cases which have held that where there is a properly maintainable class action the statute of limitations is tolled and class members may relate their claims back to the date of the original complaint.[39]

Where there has been an invalid class action filed, five district courts have by way of *dicta* made varying

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[37a]123 F.2d 979 (3d Cir. 1941).

[37b]25 F.R.D. 264 (S.D. N.Y. 1960).

[38]The cases relied upon by Respondents in opposing certiorari are cases in which class actions were properly alleged. In *Union Carbide & Carbon Corp. v. Nisley,* 300 F.2d 561 (10th Cir. 1961), the court stated that tolling is allowed as to class members only when a valid class action is found to exist. The basis upon which that court, and those which are in agreement with it, allowed tolling was by means of the fiction that the filing of a class action by one member constitutes a vicarious filing by each member of the class who decides to join. Such rationale is clearly absent when there is no class. In such instance, there can be no vicarious filing. *Esplin v. Hirschi,* 402 F.2d 94 (10th Cir. 1968) is identical in principle. The crux of the Court's decision is that the members of the class were before the Court because the action was properly maintainable as a class action. *Accord, DePinto v. Provident Security Life Insurance Company,* 323 F.2d 826 (9th Cir. 1963); and *York v. Guaranty Trust Co. of New York,* 143 F.2d 503, 529 (2d Cir. 1944).

[39]*Philadelphia Electric Co. v. Anaconda American Brass Co.,* 43 F.R.D. 452 (E.D. Pa. 1968); *State of Minnesota v. United States Steel Corporation,* 44 F.R.D. 559 (D. Minn. 1968).

pronouncements on the possible effect of the class action complaint on the statute of limitations.

Abercrombie v. Lum's, Inc., 345 F.Supp. 387, 394 (S.D. Fla. 1972); [In denying a class action, the court pointed out by way of dictum (345 F.Supp. 394, n. 13): "The statute of limitations would be no bar to those franchisees who could show that they in fact relied on the pendency of this case as a class action. *Buford v. American Finance Co.*, 333 F.Supp. 1243 (N.D. Ga. 1971); *see* Ratner v. Chemical Bank, *supra* at 1017, n. 4; Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 460-461 (E.D. Pa. 1968). As to any others, Rule 23 obviously was not designated to revive stale claims."]

Buford v. American Finance Co., 333 F.Supp. 1243, 1252 (N.D. Ga. 1971); [In denying the class action but indicating that class members who relied on the class complaint may relate back, the court stated a cautioning note (333 F.Supp. 1251): "* * * the plain truth is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation. This is clearly an 'undesirable result' which cannot be tolerated."].

Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 414 (S.D. N.Y. 1972); [The court denied a class action even though it cut off the rights of class members against whom the statute of limitations had run. It pointed out (54 F.R.D. 414):

"(5) No other member of the proposed class has evinced an interest in the lawsuit

or brought a similar suit elsewhere, and the one-year limitation period in 15 U.S.C. § 1640(e) has long since expired."

This affords a striking parallel to this action. In the instant suit, interveners evinced no interest in this action prior to the time they were solicited to sue by counsel for the State of Utah.]

Rogers v. Coburn Finance Corp. of DeKalb, 54 F.R.D. 417, 419 (N.D. Ga. 1972); [In refusing to vacate a prior order terminating the class action, the court stated (54 F.R.D. 419):

"* * * as this court pointed out in *Buford,* the members of the class plaintiff seeks to represent may still bring their own individual actions and may move this court to toll the applicable one-year statute of limitations period upon a showing that they purposely refrained from filing their own actions within the time limit in reliance upon the maintenance of a class action in the instant case."]

Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 460-61 (E.D. Pa. 1968).

[The court held that the action "may be maintained as a class action" on behalf of certain classes of plaintiffs. In its opinion, the court stated as follows, 43 F.R.D. 460-61: "Where the class action determination is affirmative, the court is merely declaring that the action may be 'maintained' as a class action, and it seems reasonably clear that

this determination relates back to the date of filing of the complaint. (For this reason, I reject the defendants' contention that an affirmative determination in these cases would constitute an invalid enlargement of the statute of limitations). But where the determination is negative, and a class action is, in the words of the Committee, 'stripped of its character as a class action' (39 F.R.D. at p. 104), it does not necessarily follow that the case must be treated as if there never was an action brought on behalf of absent class members."]

The decision of the Ninth Circuit in this case is the only one to date that actually *holds* that the statute of limitations is tolled as to all claims by the mere mechanical act of a private party erroneously designating its cause of action as a purported class action under Rule 23, F.R.Civ.P.

B. The Ninth Circuit's Decision Abridges the Substantive Provisions of Section 5(b) of the Clayton Act.

On May 24, 1969, the tolling period contemplated by Section 5(b) of the Clayton Act came to an end for purposes of this case. It follows that applicants could not present their claims after the period allowed by such statute unless the mere mechanical act of typing the words "class action" on the complaint had the effect of abrogating the requirements of Section 5(b). Indeed, Respondents' brief in opposition to the Petition for a Writ of Certiorari (at 9) correctly posed the ultimate question herein, *i.e.*, "whether the Clayton Act statute of limitations is tolled for purported members of a class when the action is filed before but denied

after the date that the limitations run." Can Respondents, who had the opportunity to join one of several previous class actions involving the subject matter of this action, avoid the bar of Section 5(b) of the Clayton Act by Utah's mechanical act of erroneously designating the action as still another class action?

The Supreme Court has never ruled whether the filing of a valid or invalid class action under Rule 23 affects the running of any statute of limitations as to the purported class members, including Section 5(b) of the Clayton Act and the numerous other statutes of limitations enacted by Congress.

Petitioners have a substantive right conferred by Congress to bar antitrust actions not brought within the time prescribed in 15 U.S.C. §§ 15b and 16b. Congress granted injured persons treble damage actions in the antitrust area and explicitly required that such actions be brought within congressionally delineated time periods. Such Congressional purpose was ably summarized by Judge Pence as follows:

> "* * * In § 5(b) Congress not only created new rights for antitrust plaintiffs but also clearly created obverse rights for antitrust defendants. * * * Specifically tailored as they were for antitrust litigation, this court cannot but determine that § 5-(b) certainly, and § 4B rationally, were intended by Congress to become an integral part of the entire antitrust legislative scheme." (A. 497; R. 460. 50 F.R.D. 99, at 107-08).

Congressionally conferred rights can only be taken from Petitioners by act of Congress and cannot be

abrogated by judicial resort to rules of procedure. "Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that 'such rules shall not abridge, enlarge or modify any substantive right.' "[40]

In the present case, legal fiction aside, it is uncontroverted that Respondents took no action to intervene until a date more than six months after the termination of the one-year suspension period provided by Section 5(b) of the Clayton Act.[41] The decision of the Ninth Circuit clearly contradicts Section 5(b) of the Clayton Act since it eliminates the requirement that the litigant bring his action either (a) within the suspension period, *i.e.*, within 1 year after the Government suit had terminated or (b) within 4 years after his cause of action accrued. Such decision also abridges the substantive rights of antitrust defendants to bar stale claims pursuant to Section 5(b) of the Clayton Act. Indeed, the Ninth Circuit has held in other cases that "the right to bar an action for lapse of time

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[40]*Eisen v. Carlisle & Jacquelin*, 1973 Trade Cases, ¶ 74,476, p. 94,111 at p. 94,117 (2d Cir. 1973).

[41]Under the language of Section 5(b) of the Clayton Act, the barring provisions of Section 5(b) of the Clayton Act would have been triggered by termination of the Government criminal action on June 19, 1964. However, in *Maricopa County v. American Pipe and Construction Co., et al.*, 303 F.Supp. 77 (D. Ariz. 1969) Judge Pence held that a second Government civil action had a further tolling effect and that such tolling continued until May 24, 1969, one year following the termination of the Government civil actions as to the last defendant, American. Respondents' motion to intervene was not filed until December 12, 1969.

is a substantive right."[42] It follows that the decision of the Ninth Circuit at issue herein is in direct contradiction with the principles enunciated by this Court:[43]

> "* * * The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

Similarly, Congress saw fit to limit private claims for violations of the securities laws to a one-year period.[44] A variety of other federal statutes of limitation are also within the ambit of the judgment of the Ninth Circuit at issue herein (Examples thereof [twenty-six in number] are set forth in Appendix G, Petition for Writ of Certiorari, 54-58). The policy underlying each of such statutes would clearly be thwarted by the tolling exception created by the Ninth Circuit in the instant action. As a result of the decision herein, the Ninth Circuit has engrafted yet another judicially created exception onto the various statutes of limitation that have been established by Congress. As stated before, it has ignored altogether the well-established principle that rules

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[42] *John E. King v. Alaska Steamship Company*, 431 F.2d 994, 996 (9th Cir. 1970).

[43] *The Harrisburg v. Rickards*, 119 U.S. 199, 214 (1886), *rev'd on other grounds, Moragne v. States Marine Line*, 398 U.S. 375, 26 L.ed.2d 339, 361, 90 S.Ct. 1772 (1970).

[44] 15 U.S.C. §§ 77m, 77www, 78i and 78r.

of procedure such as Rule 23 cannot be employed to abridge or enlarge substantive rights.[45]

Under the Opinion of the Ninth Circuit, Respondents can accept the benefits of the tolling provisions of Section 5(b) of the Clayton Act which enables the State of Utah to bring the action and at the same time repudiate its barring provisions. By attempting to invoke the benefits of the tolling provisions of the statute of limitations without accepting the obligations imposed by the same provisions, Respondents are urging an interpretation of this statute which is plainly at odds with the principles enunciated by this Court in *The Harrisburg, supra,* and with the accepted canon of statutory interpretation that the statute must be construed as a whole in the light of its purpose.[46] It is likewise inconsistent with the rule that tolling exceptions cannot be engrafted upon Section 5(b) of the Clayton Act.[47]

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[45] *Eisen v. Carlisle & Jacquelin,* 1973 Trade Cases ¶ 74,476, p. 94,111 (2d Cir. 1973); *Philadelphia Electric Co. v. Anaconda American Brass Co.,* 43 F.R.D. 452, 460 (E.D. Pa. 1968).

[46] *cf. Worcester Felt Pad Corp. v. Tucson Airport Authority,* 233 F.2d 44, 49 (9th Cir. 1956).

[47] *Hall v. E. I. Du Pont De Nemours & Co.,* 312 F.Supp. 358, 360 (E.D. N.Y. 1970) The court refused to engraft a tolling exception onto Section 5(b) and pointed out:

> "The power to create tolling exceptions judicially is limited by the general rule that, when a federal statute of limitations exists, it acts as a total bar, extinguishing the right to sue accorded by other statutory provisions."

District Judge Martin Pence set forth the applicable principles of law in the following scholarly language:

> "If the analyses of Justices Waite and Douglas and Judge Learned Hand on the bar on limitations in the context of rights created by statute are valid, then within the purview of the § 5(b) at least, any enlargement of tolling of that statute by virtue of the Rules cannot rationally be categorized as procedural.
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> "By judicial equitable fiat, § 4B is tolled by fraudulent concealment. By the legislative ukase of § 5(b), it is further

(This footnote is continued on next page)

Rules 23 is after all a judicial creation. It affords no basis for procedural excesses or for abridging substantive rights of the Petitioners. To deal with the Rule on its own terms is difficult at best. To create a judicial fiction that purported class members of a non-existent class action are before the court, and action taken later by purported class members relates back to the original complaint in order to defeat the statute of limitations, is to obscure bald usurpation of Congressional authority by the Ninth Circuit under the guise of implementing procedural rules. The congressional statute of repose has been violently wrenched, if not replaced, by the Ninth Circuit's interpretation of Rule 23. This is contrary to the elementary principle that court rules are subject to congressional statutes; rules and statutes are subject to the Constitution. We submit that the decision of the Ninth Circuit is contrary to the principles enunciated by this Court in *Snyder v. Harris*[48] which clearly delineated this proper priority. The court in *Snyder* found that Rule 23 could not be used to aggregate claims of class members to meet the statutory requirement of jurisdiction in diversity cases.

Even where a true class exists the class is not an entity; it consists of persons with separate claims. Rule

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tolled by government suit. In the context of the facts of this case, plaintiff would have the tolling period specified by § 5(b) additionally tolled by virtue of the Rules of Civil Procedure.

* * *

"It thus appears to this court that the only statutory 'right' given to a defendant in an antitrust case, viz., the right to interpose the bar of limitations to attempted tolling of § 5(b) by Rule 23, F.R. Civ.P., is a substantive right—as a necessary segment of the total sphere of antitrust legislation. Any attempt to additionally toll § 5(b) via the Federal Rules of Civil Procedure would appear to be an abridgement of that substantive right." (A. 496-97; R. 459-60. 50 F.R.D. 99, 107-08).

[48]394 U.S. 332 (1969).

23 was established as a procedural device to facilitate the adjudication of individual claimants. By analogy, individual class members (in this case of a non-existent class) must each satisfy the statutory requirements of the statute of limitations. There cannot be a judicial created agglomeration, a court sponsored entity, which appears *ipso facto* before the Court simply on the filing of a complaint reciting the language of Rule 23. The decision of the Ninth Circuit herein is the only one to date that holds that the statute of limitations is tolled as to all claims by the mere mechanical act of a private party in erroneously designating its purported cause of action as a class action under Rule 23, F.R.Civ.P. Such decision must be reversed because it is not supported by any rationale or precedent and conflicts with the congressional policy underlying the statutes of limitations abrogated thereby.

II.

The Decision of the Ninth Circuit, if Left Undisturbed, Will Create Substantial Problems in the Administration of Both Rule 23 and Rule 24, F.R.Civ.P., and Will Deprive Defendants of Due Process of Law.

A. The Problems Inhering in Rule 23.

The Ninth Circuit has held in essence that permissive intervention of purported class members must be granted where the class has been denied and the claims of purported class members would otherwise be barred by the statute of limitations. We submit that such a use of the rules of procedure by the judiciary to skirt congressionally enacted statutes of limitations will result in serious mischief for judicial administration of multi-party litigation. It is an open invitation for lawyers to

dutifully recite the litany of Rule 23 allegations and thus toll the statute as to potential class members regardless of the merits of the class claim; solicitation of class members will be assured and many otherwise uninterested litigants may be conscripted for the litigation.

Not long after the new Rule 23 was adopted, Judge Lumbard in dissenting in *Eisen v. Carlisle & Jacquelin*[49] on its first appearance in the Second Circuit, described the Rule as a "Frankenstein monster." Judge Lumbard proved to be remarkably accurate. After some five years of unbelievable procedures at the trial level after remand—during which the district judge bent procedure and substance in an attempt to make the class action viable—Judge Medina concurred with Judge Lumbard on the second appearance of *Eisen* in the Second Circuit. That Court dealt with most of the evils of the amended Rule and Judge Medina made the following observations respecting Rule 23:

> "*Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads amended Rule 23 contemplates and provides for no such procedure.* Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. We hold the 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."
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> "Class actions have sprouted and multiplied like the leaves of the green bay tree. No matter how

[49] 391 F.2d 555, 572 (2d Cir. 1968).

numerous or diverse the so-called class may be or how impossible it may be ever to compensate the individual members of the class, a champion steps forth. * * * *So far as we are aware not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the merits. But the preliminary procedures, including the preliminary mini-hearing on the merits, such as those conducted by Judge Tyler in order to decide whether or not this case was a proper class action, and the huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders, have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim.*"[50] (Emphasis added).

Rule 23 has also come under close scrutiny by scholars, attorneys and the district courts. Recognition is being given to the fact that the Rule has serious defects and is creating great problems in the administration of justice. A special committee of the American College of Trial Lawyers reported the following:

"The conclusion of this Committee is that Rule 23, as written and as applied over the last half decade, has failed to achieve its purposes. We suggest that in the areas of judicial economy and fairness to the parties, the experienced results have been directly contrary to the intended purposes. The (b)(3) class suit has mandated heavy expenditures of judicial time, effort and expense. The

[50] *Eisen v. Carlisle & Jacquelin*, 1973 Trade Cases, ¶ 74,476, p. 94,111 at p. 94,121.

expenditures have been sustained only by sacrificing procedural and substantive fairness to the party opposing the class. Nor does it appear that these burdens can in any sense be justified by the limited benefits accruing to class claimants."[81]

Mr. Earl E. Pollock, writing in the *Business Lawyer*, summarized the judicial corner cutting, the abandonment of procedural and substantive rights and the creation of a double standard for Rule 23 proceedings resulting from the misguided zeal of some courts to implement class actions at the expense of constitutional and statutory safeguards. As a keen observer of the class action in practice, Mr. Pollock has demonstrated the deleterious effects that class actions have had on the orderly administration of justice in the following language, *i.e.*:

> "Thus, in the name of 'flexibility' and 'discretion,' a kind of double standard has been emerging: in litigation other than class actions, prescribed substantive requirements and basic procedures continue to govern; but in class actions, primarily in order to make them 'managable,' at least some courts have sanctioned a contraction of both defendants' rights and plaintiffs' obligations. This double standard is almost routinely rationalized by the now-familiar litany that it would 'emasculate' Rule 23 or 'sound the death knell' of class actions to apply established principles. Instead of determining whether a proposed class action would be 'manageable' within a framework of such principles—including constitutional and statutory re-

[81]Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure, American College of Trial Lawyers (March 15, 1972), at pages 5-6.

quirements—these courts have shown an alarming tendency to decree changes in the principles to make the case 'manageable.'

"Such an approach—placing Rule 23 *uber alles* —represents a complete reversal of what naive lawyers like myself always thought was the governing hierarchy of values in our legal system—*that court rules are subject to statutes, and that both court rules and statutes are subject to the higher authority of the Constitution.*

* * *

"The double standard has encompassed not only substantive rights but constitutional rights as well. Take, for example, the device of awarding the class a lump sum recovery to avoid separate trials on damage issues.

* * *

"Similar subordination of constitutional rights to the exigencies of Rule 23 is implicit in other procedural shortcuts devised to make class actions 'manageable.' It is proposed that defendants be denied any opportunity to cross-examine claimants; that questions of impact and damages be decided in the abstract or on affidavits, rather than testimony; and that this be done by a special master or committee of counsel, rather than by a jury.

* * *

"Yet some courts—not including, however, the Court of Appeals for the Seventh Circuit—have held that such discovery is not permitted in class actions except as to the class representative. They have taken this position on the extraordinary ground that other class members—even though they have not 'opted out' and ostensibly are de-

manding the payment of millions of dollars—are not 'parties' to the action and that permitting such discovery 'would emasculate Rule 23' and 'would be incompatible with' its rationale."[53] (Emphasis added).

In an oft-quoted statement, Judge Edenfield of the Northern District of Georgia wrote candidly in *Buford v. American Finance Company*, 333 F.Supp. 1243, 1251 (N.D. Ga. 1971):

> "This is an appropriate moment for the court to express its grave concern over the increasing resort to the class action device in actions seeking monetary relief. The class action is supposed to 'achieve ecnomies of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.' Advisory Committee's Notes, *supra*, 102-103. Today, however, many claims which simply did not exist have been brought to life by our courts through the judicial act of allowing a class action to be maintained. Although some courts say these claims are not brought because plaintiffs believe the potential recovery would be too small to justify the time and expense of litigation, *the plain truth is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation.* This is clearly an 'undesirable result' which cannot be tolerated. Until otherwise directed this court, for one intends to carefully scrutinize every action in which plaintiffs seek monetary re-

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[53] "Class Actions Reconsidered: Theory and Practice Under Amended Rule 23," Earl E. Pollock, 28 *Business Lawyer* 741 at 746-49 (April 1973).

lief and wish to represent a class of similarly situated persons to determine if all the requirements of Rule 23 are fully satisfied, and it will not hesitate to exercise whatever discretion is granted it by the Rule in such matters." (Emphasis added).

See also,

Schaffner v. Chemical Bank, 339 F.Supp. 329 (S.D. N.Y. 1972);

Cotchett v. Avis Rent A Car System, Inc., 56 F.R.D. 549 (S.D. N.Y. 1972);

Shields v. Valley National Bank of Arizona, 56 F.R.D. 448 (D. Ariz. 1971);

Ratner v. Chemical Bank New York Trust Company, 54 F.R.D. 412 (S.D. N.Y. 1972); and

Rogers v. Coburn Finance Corp. of DeKalb, 54 F.R.D. 417 (N.D. Ga. 1972).

The problem of solicitation of litigants by counsel and the attendant burden upon the judicial system is not simply a matter of intellectual curiosity. The District Court noted that the State of Utah engaged in a program of solicitation in order to find a group of would-be interveners.[53] While we do not suggest or imply that counsel for Utah acted other than with the greatest rectitude, nevertheless, the decision of the Ninth Circuit, if left uncorrected, will encourage, indeed it will invite even more soliciation in future actions.

As a result of the Ninth Circuit's decision, counsel on behalf of future plaintiffs will find it irresistible to

[53]A. 482; R. 447; 50 F.R.D. at 100.

allege class actions. Until such time as a negative order respecting the class action is entered, plaintiffs' counsel can solicit potential class members. Upon the entry of such a negative order, plaintiffs' counsel can then file motions to intervene pursuant to Rule 24(b) on behalf of those potential class members that it has solicited. "Permissive" intervention would, under the Ninth Circuit's decision, have to be granted to such potential class members—even though the statute of limitations may have run long before the motions to intervene were even filed. Class allegations can be anticipated as in complaints where there is little or no hope of meeting the prerequisites of Rule 23.

The absurdity of the Ninth Circuit decision is demonstrated by the application of its rationale to the facts in the *Eisen* case. In the *Eisen* case, a class action complaint has been pending for some five years on behalf of a purported class of six million odd-lot stock buyers, each with an estimated average claim of $1.30. In May of this year the Second Circuit at last found no proper class action could be maintained under Rule 23. Under the reasoning of the Ninth Circuit, the Clayton Act statute of limitations has been tolled for five years for 6,000,000 would-be claimants, any or all of whom are now entitled as of right to intervene in the litigation. The question arises as to whom Rule 23 is intended to benefit. Tolling in that situation does not benefit obviously disinterested claimants. Tolling to permit intervention by such a potentially vast army does not benefit the courts in their already overburdened capacity. Tolling can only be a device to benefit plaintiff's counsel. Thus, in *Hawaii v. Standard Oil Co.*,[84]

[84] 405 U.S. 251 (1972).

the Supreme Court confined Clayton Act treble damage remedy to persons who had been injured in accordance with the statutory requirements. This Court denied antitrust recovery to a state in a claimed *parens patriae* capacity. The opinion of the Ninth Circuit is inconsistent with *Hawaii v. Standard Oil Co.* in that it accords status as litigants to absent (and in many cases unidentifiable) members of such purported class in order to toll the statute of limitations.

B. The Constitutional Questions Involved.

The Ninth Circuit abridgment of the statute of limitations raises procedural due process questions. The Court held:

> "* * * [W]e hold that as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits. The requirements of § 5(b) were then met."[55]

Upon the filing of Utah's complaint, only one party was actually before the court by virtue of having undertaken to assert its alleged claims—Utah. The Ninth Circuit chose to treat the would-be class members as if they had filed suit. Fictions aside, however, they had done nothing. In fact, only seven of the would-be class members were even aware of the existence of Utah's action prior to the running of the statute of limitations (moreover, in their affidavits, the "relying seven" were

[55]Petition for a Writ of Certiorari, Appendix D, at 38.

required to go outside the damage period to establish purchases of pipe during such relevant period).[58]

The decision of the Ninth Circuit, or any procedural rule, which permits intervention by purported class members *after* the statute of limitations has run, may well deny due process of law to defendants. The Federal Rules of Civil Procedure may not be employed in such a manner as to deny due process of law to defendants.

Thus, in *Iocono v. Anastasio,* 79 F.Supp. 378 (S.D. N.Y. 1948), an action was brought by thirty-five specifically named plaintiffs to recover alleged unpaid overtime compensation. The plaintiffs moved for leave to amend a complaint by adding as plaintiffs such other employees of the defendant who may join as plaintiffs in the action before trial. In denying plaintiffs' motion, Judge Medina stated:

> ". . . It will not suffice that someone else has a pending lawsuit against the defendant sought to be charged, in which similar but nevertheless different and separate claims are alleged, and that through some ignorance or excusable neglect reference to the person seeking to intervene and to his separate and individual claim was wholly omitted. No amount of good excuses or equitable considerations of one sort or another can alter the fact that there is not now pendng any action whatever by or on behalf of these individual claimants. Accordingly, the relief prayed for must be withheld. *To hold otherwise would be to dispense with the most elementary requirements of due process.*" (Emphasis added).

Iocono v. Anastasio, 79 F.Supp. 378, 382;

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[58]A. *388-428.* R. 389-438; 50 F.R.D. 99, 101, n. 1.

Longbottom v. Swaby, 397 F.2d 45 (5th Cir. 1968);
Lewis v. Lewis, 358 F.2d 495 (9th Cir. 1966); and
Murfkan v. Kahn, 11 F.R.D. 520 (S.D. Fla. 1951).

We have heretofore established that the right to assert the bar of the statute of limitations is a substantive right. It follows the abrogation of such substantive right by a rule of procedure is in violation of due process of law.[57]

C. Recommended Solution of Rule 23 Problems by the Supreme Court.

We urge the Supreme Court to hold that the filing of a class action does not toll the statute of limitations for absent class members in Clayton Act treble damage cases. This Court should establish the principle that each individual of the purported class must independently satisfy the statute of limitations requirements. It would be incumbent upon each individual to take such positive action as would satisfy the requirements of Rule 8, F.R.Civ.P. *prior* to the running of the statute of limitations contained in the Clayton Act. The filing of a class action would be a completely neutral factor that would have no bearing on whether would-be claimants have satisfied the statute of limitations by taking the minimum positive steps contemplated by Rule 8.

Such a pronouncement by this Court would aid the courts in approaching Rule 23 as an exclusive procedural device where the determination of whether there is a proper class action would be made by reference to the requirements of the Rule secure with knowl-

[57] *King v. Alaska Steamship Company*, 431 F.2d 994 (9th Cir. 1970).

edge that the decision, whether affirmative or negative, would have no effect on the substantive rights of any of the litigants. Removal of substantive impact of class-action decisions would go far toward meeting the problems raised by Mr. Justice Black in dissenting from promulgating the amended rules.[58]

To put an end to the fiction that purported class members are before the court automatically as of the time a complaint with class allegations is filed would work no hardship on litigants or the courts. If a person has a claim he wishes to pursue, it is not requiring too much to have him take the very modest steps required by Rule 8 if he wishes his rights adjudicated. If a statute of limitations is deemed too short, it is for the Congress to extend it. The courts will not be burdened since experience under class actions has shown a reluctance by most purported class members to take positive action to come into the case. Most persons have no interest in engaging in litigation; most are conscripted in class actions. There would be no deluge of simultaneous claims filed in several different jurisdictions. If, in a rare case, there were a multiplicity of filings, the courts have adequate procedural powers to consolidate such claims in the most efficient manner. A more likely result would be a reduction in solicitation of claims and a diminished number of claims being prosecuted in the federal courts.

Experience under Rule 23, F.R.Civ.P., demonstrates the need for the Supreme Court to reassert the limited *procedural* aspects of the class action and to reemphasize the basic principles that Rule 23 cannot abridge either statutory or constitutional rights of defendants.

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[58]383 U.S. 1032, 1035 (1966).

III.

The Decision of the Ninth Circuit Contravenes the Provisions of Rule 24, F.R.Civ.P., Established by the Supreme Court.

The opinion below of the Ninth Circuit apparently assumed that the District Court's decision denying permissive intervention was a ruling as a matter of law that the claims of all interveners were barred by Section 5(b) and did not constitute an exercise by Judge Pence of his discretion.

One of the factors considered by the District Court in denying Respondents' motions to intervene was the history of the West Coast Pipe Cases which had been pending for five years prior thereto. In such cases, Respondents could have joined one of the several class actions which described classes including the Respondents. Had they done so, they could have raised their claims in a timely and expeditious manner. They chose not to do so. Thereafter, they could still have raised their claims prior to the running of the limitations' period. The District Court's opinion denying class action status, which was incorporated by reference in its opinion denying interventions[59] noted that counsel for the State of Utah had been reviewing the action in the West Coast Pipe Cases for "over six months before the statute of limitations ran"[60] and thus, Utah was charged with knowledge of the prior class actions and the attendant problems respecting further class actions.[61] During such period, Respondents' counsel

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[59]*State of Utah v. American Pipe and Construction Co., et al.*, 50 F.R.D. 99 (C.D. Cal. 1970). A. 482-502; R. 447-65.

[60]*State of Utah v. American Pipe and Construction Co., et al.*, 49 F.R.D. 17, 21 (C.D. Cal. 1969); A 354; R. 356-57.

[61]"The court notes from plaintiff's affidavits that the Attorney General of the State of Utah and Attorney Miller sometime in

could either have filed separate actions on their behalf (and have consolidated such actions for trial) or have sought joinder of any Respondent authorizing Plaintiff Utah to bring suit on its behalf (Rule 20(a) F.R.Civ.P.).

After six months of study of their purported cause of action, Respondents were charged with the knowledge that a further class action was not feasible. With such knowledge Respondents chose the device of still another class action. As found by the Trial Court:

"1. All governmental bodies in the alleged 'class' who may feel themselves injured by any alleged 'Western Pipe' conspirators had over five years from at least March 10, 1964, to May 23, 1969, to seek redress, jointly or severally. Each has at all times been represented by counsel. No 'Creditors' bill' situations are here involved.

"2. No more than seven of petitioners ever discussed with plaintiff's attorney the possibility of a pipe antitrust suit against the defendants herein. Nothing appears in any of their affidavits to

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October 1968—over six months before the statute of limitations ran—started a study of the western pipe conspiracy. Any detailed study of the litigation then and theretofore pending in the western pipe cases would have disclosed the facts which this court has above recited. A study of the law on the application of a class action to pipe cases as reflected in City of New York v. International Pipe & Ceramics Corp. (44 F.R.D. 584, S.D.N.Y., April 16, 1968) reported in Trade Regulation Reports shortly thereafter and in Federal Rules Decisions in November 1968, should also have raised a caveat in Utah's determination of the law which might be applied to the present litigation. It should have been unquestioned on the part of the plaintiff's attorneys that individual action by affected parties, particularly the states, large cities and other large public entities in the Western Area, should have been taken long before any class action was belatedly filed in this case, if in fact any of them believed the alleged conspiracy had injured them." 49 F.R.D. 17, 21; A. 354; R. 356-57.

indicate why they should have 'relied' on Utah's counsel and suit, rather than immediately proceed to process their own claims and suits. None was foreclosed from filing his own suit by the fact that plaintiff's attorneys planned to file a class action. None of the petitioners moving to intervene were entitled to rely upon such action as a class action.

"3. * * * [T]here is insufficient showing by any of the aforesaid petitioners that they properly relied upon the purported class action brought by the State of Utah; and the Court, therefore, finds that none of such parties did in fact rely upon such action as a class action.

"4. The granting of any of the aforesaid motions to intervene or to amend the Complaint would violate the rights of defendants to fairness and due process.

"5. The tolling of the statute of limitations based upon the government actions pleaded in Paragraph VIII of the Utah Complaint, which tolling is also pleaded in each of the proposed causes of action by each of the parties moving to intervene herein, ceased on May 24, 1969; and insofar as any of the proposed causes of action by said parties moving to intervene herein is based upon the aforesaid government actions pleaded in Paragraph VIII of the Utah Complaint, such action is barred by the applicable statute of limitations.

"6. *There never was a class within the meaning of Rule 23, F.R.C.P., as alleged in the Complaint herein, and the members of the purported 'class' described herein cannot claim that they started their suits, vicariously, before the tolling period expired.*"[23] (Emphasis added).

[23] A. 506-07; R. 444-45.

In addition to the factors reflected in the foregoing Findings of Fact, the District Court considered the prejudice to the defendants which would result from intervention:

> "It thus appears to this court that the only statutory 'right' given to a defendant in an antitrust case, viz., the right to interpose the bar of limitations to attempted tolling of § 5(b) by Rule 23, F.R.Civ. P., is a substantive right—as a necessary segment of the total sphere of antitrust legislation. Any attempt to additionally toll § 5(b) via the Federal Rules of Civil Procedure would appear to be an abridgement of that substantive right."[63]

In that regard, the District Court stated in its opinion denying intervention:

> "* * * [T]o permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would be in the context of this case, seriously prejudiced the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case."[64]

In exercising its discretion the Court also considered the fact that in order to find a group of interveners, the State of Utah engaged in a program of solicitation.[65] It is also pertinent that in exercising its discretion the trial court likewise considered the character of the purported claims of Respondents. The trial court

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[63]A. 497; R. 460.
[64]A. 486; R. 451.
[65]50 F.R.D. 100. A. 482; .R 447.

indicated in its footnote number one that even the so-called "relying seven" had to go outside the damage period in order to show purchases of pipe which could have been actionable.[66] Additionally applicants have made no showing whatever that their purchases of pipe were of a category on which the statute had not run.[67] Of the applicants in intervention, thirty-seven (or more than one-half) did not show any evidence whatsoever of having made any purchases of pipe. Twenty-seven of the remaining applicants stated that they made pipe purchases of some kind, but did not limit such showing to the 1954-1962 damage period. Several of the applicants did not even show any pipe purchases during the 1954-1962 damage period.[68]

All of the foregoing factors were considered by the District Court in exercising its discretion. In so doing, the District Court was fulfilling the mandate of Rule 24(b) that "in exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

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[66]*State of Utah v. American Pipe and Construction Company*, 50 F.R.D. 99, 101 (C.D. Cal. 1970). A. 483; R. 448.

[67]A. 284-312; R. 286-315. American was not a party to two of the Government civil actions—those involving steel large and small diameter pressure pipe. See footnote 13, *supra*.

[68]A. 388-428; R. 389-439.

A. The Decision Below Reversing a Discretionary Ruling of the District Court Was Not Based on a Showing of Abuse of Discretion and Is, Therefore, in Conflict With the Decisions of This Court and With Other Circuits as Well as the Plain Language of Rule 24(b), F.R.Civ.P.

In its opinion of January 31, 1973, the Ninth Circuit held:

> "The order of the District Court is affirmed as to intervention under Rule 24(a). As to intervention under Rule 24(b), the matter is remanded with instructions that the order be vacated and for further proceedings upon the motions."[69]

The decision of the Ninth Circuit simply ignored the discretionary portion of the District Court's opinion and all of the factors (as set forth hereinabove) that were considered by the District Court. Such discretionary decision should, however, have been given the greatest latitude by the Ninth Circuit. By virtue of having presided over the West Coast Pipe Cases the District Court was familiar with all respects of that litigation and of the facts underlying Respondents' alleged causes of action. Such experience and factual background made the District Court uniquely qualified to weigh all the factors pertinent to intervention.

By ignoring the discretionary portion of the District Court's ruling and reversing that ruling on the statute of limitations' issue alone, the Ninth Circuit contradicted a long line of Supreme Court decisions including *Railroad Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 91 L.ed. 1646 (1947)[70] and decisions of

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[69]Court's Opinion, Petition for a Writ of Certiorari, Appendix D at 39).

[70]*See also, Allen Calculators, Inc. v. National Cash Reg. Co.*, 322 U.S. 137, 142 (1943).

the Sixth, Eighth and Tenth Circuits[71] that have held that discretionary decisions of the District Courts are to be reversed *only* upon a clear showing of abuse of discretion. Heretofore, no appellate court had reversed such a discretionary decision except upon a clear showing of abuse of discretion. The principle is so well established as not to be subject to question. Thus, the decision below is so at odds with the principles established by this Court and followed by other Circuits that it requires correction.

B. The Ninth Circuit's Decision Conflicts With the Heretofore Accepted Principle That a Petition to Intervene Is Measured for Purposes of the Statute of Limitations as of the Date It Was Filed.

A petition to intervene in an action must satisfy any applicable statute of limitations. That is to say, the party seeking to intervene must place its claims before the court prior to the time that those claims became barred by a statute of limitations.

As was stated in *Kam Koon Wan v. E. E. Black, Ltd.*, 75 F.Supp. 553, 564 (D. Hawaii 1948):

> "* * * Under ordinary rules, since the filing of a petition to intervene marks the introduction of a new party and a new cause of action the situation is measured for the purposes of the statute of limitations as of the date it was filed. If that date was not within the time limited, the intervention is barred."[72]

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[71] *See, FMC Corporation v. Keizer Equipment Company*, 433 F.2d 654, 656 (6th Cir. 1970); *Bumgarner v. Ute Tribe of Uintah and Ouray Res.*, 417 F.2d 1305, 1309 (10th Cir. 1969); *Edmondson v. State of Nebraska*, 383 F.2d 123, 127 (8th Cir. 1967); and *Stadin v. Union Electric Company*, 309 F.2d 912 (8th Cir. 1962).

[72] *Accord, Athas v. Day*, 161 F.Supp. 916-19 (D.Col. 1958); *cf. Hobbs v. Police Jury of Morehouse Parish*, 49 F.R.D. 176, 179-80 (W.D. La. 1970).

Decisions allowing intervention in class actions after the running of a statute of limitations are simply inapplicable. There was no class action in the present case.

C. The Decision of the Ninth Circuit Established Mandatory Rather Than Discretionary Intervention Under Rule 24(b), F.R.Civ.P.

In its opinion below the Ninth Circuit announced an unprecedented and unsupported rule to the effect that whenever a class action is filed, anyone who is purportedly a member of that class must be permitted to intervene if the class is found not to be properly constituted under Rule 23 and if the alleged members of the class would otherwise be precluded from filing suit by the statute of limitations. The Ninth Circuit recognized that the practical effect of its decision was to render certain classes of permissive intervention mandatory:

> "This being so, it did not lie within the discretionary province of the District Court to deprive them of the eleven days balance of time remaining to them under § 5(b)."[73]

Thus, although the Ninth Circuit pays lip service to approving and affirming the decision of the lower court that Respondents were not entitled to intervention as a matter of right under Rule 24(a), the decision converts all 24(b) discretionary interventions into mandatory intervention as of right if the statute of limitations has run against the would-be class members.

The Ninth Circuit did not attempt to square its holding with the provisions of Rule 24(b) as promulgated

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[73]Petition for a Writ of Certiorari, Appendix D at 39.

by the Supreme Court or the entire body of case law thereunder. It could not do so because discretionary intervention cannot be squared with intervention as of right. Thus the opinion constitutes a judicial repeal of Section 24(b), F.R.Civ.P.

D. The Ninth Circuit's Decision Contravenes the Mandate of Rule 24(b), F.R.Civ.P., That the Trial Court Shall Consider Whether Intervention Will Prejudice the Original Parties.

Rule 24(b), F.R.Civ.P., mandates that the district court, in exercising its discretion thereunder: "* * * shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."[74] The Ninth Circuit paid no heed to the Trial Court's finding that intervention would seriously prejudice the original parties. Prejudice to the defendants resulting therefrom is self-evident and is underscored by the history of the West Coast Pipe Cases. After widespread publicity and requests for intervention, a settlement was made therein upon the payment of more than $21,000,000 to approximately 350 claimants. United States Steel Corporation, Kaiser Steel Corporation and Martin-Marietta paid approximately $4,000,000 more than their pro rata share of the settlement. Such double payment by the defendants would not have been made but for the understanding of defendants that all claims arising from the alleged conspiracy were settled.[75] Thus, the Trial Court arrived at the inevitable conclusion that to allow intervention of litigants who slept on their rights for five years would unduly prejudice the rights of defendants herein. The Ninth Circuit's decision in favor of such

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[74]*See, Stadin v. Union Electric Company,* 309 F.2d 912 (8th Cir. 1962).

[75]A. 438-39; R. 490, 493-94.

dilatory litigants is in disregard of the clear mandate of Rule 24(b) against intervention that will prejudice the rights of the original parties.[76]

E. The Applications to Intervene Were Not Timely.

It is elementary that an application to intervene pursuant to Rule 24(b), F.R.Civ.P., can be granted by the District Court only upon timely application. Both the language of Rule 24(b) and the case law so provide.[77]

The Complaint in this action has been pending since May 3, 1969. It is based upon Grand Jury indictments early in 1964 and a damage period which extended between 1954 and 1962.[78] Between 1964 and 1967 there were seven prior class actions in which all potential plaintiffs were solicited to intervene and the Respondents herein could have intervened merely by the asking.[79] For a period of six months prior to the date of the filing of the Complaint herein on May 13, 1969, the State of Utah's counsel had been studying the case and is charged with knowledge that the class alleged

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[76]"The trial court may take into account all the circumstances of the case, including any circumstances contributing to delay in the application for intervention. [Citing cases] * * * '[T]he most important factor' which should be considered by the trial court 'is whether any delay in moving for intervention will prejudice the existing parties to the case.' 2 Barron & Holtzoff, *supra*, § 594, at 366." *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 1115 (5th Cir. 1970).

[77]*Smith Petroleum Service, Inc. v. Monsanto Chemical Co., supra; United States v. Blue Chip Stamp Company*, 272 F.Supp. 432, 435 (C.D. Calif. 1967); and *Basle Theatres, Inc. v. Warner Bros. Pictures Dist. Corp.*, 24 F.R.D. 476 (W.D. Pa. 1959).

[78]A. 484, Footnote 2; R. 449, Footnote 2. (See also, Interveners' Amended Complaint, A. 503; R. 441).

[79]A. 347-48; R. 349, 350-51; *State of Utah v. American Pipe and Construction Co., et al.*, 49 F.R.D. 17, 18-19 (C.D. Cal. 1969).

had already been exhausted by prior class actions.[80] Nevertheless, Respondents made no motion to intervene till more than six months after the statute of limitations ran on May 24, 1969, and after the Court's ruling in December 1969 concerning the class action. The foregoing facts establish that the attempted intervention does not meet the requirement of timely application as spelled out in Rule 24(b). Moreover, Respondents are guilty of the ultimate failure to meet the requirement of timely intervention in that they deferred their motion to intervene for approximately six months after May 24, 1969, the date on which the period of limitations pursuant to Section 5(b) of the Clayton Act finally ran. It follows that the motion to intervene was not timely as a matter of law.

IV.

Conclusion.

The decision of the Ninth Circuit utilized the Federal Rules to abrogate a congressional enacted statute of limitations and thereby deprive defendants of important substantive rights. The statute of limitations evidences a congressional policy favoring repose. Such a policy has been deemed socially desirable in determining a termination point for litigation and is based upon a belief that it is undesirable to have potential litigation forever open. This decision in favor of repose also is designed to insure fairness to defendants.[81]

This policy is of particular importance in the antitrust area because of the protracted and complex nature of antitrust proceedings. It is evident that, in establishing a four-year statute of limitations for anti-

[80]A. 354; R. 356-57; 49 F.R.D. 17, 21.
[81]A. 464-67, 475-81; R. 544-49, 566-79.

trust actions, Congress intended to further the policy of fairness and to promote prompt adjudications as well as settlements. Section 5(b)'s design to promote both settlement and fairness to defendants, as well as to promote timely private enforcement of the antitrust laws, is evidenced by the requirement that "whenever the running of the statute of limitations in respect of a cause of action arising under Section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."[82] The Court of Appeals legislated an exception to the statute of repose by a fiction which added another chapter to the procedural excesses used by some courts under Rule 23 to abridge rights of defendants.

By the simple expedient of alleging the existence of a class pursuant to Rule 23, F.R.Civ.P., a plaintiff can, under the Ninth Circuit's decision, toll the statute of limitations governing claims of would-be class members for such period of time as is required for the

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[82]15 U.S.C. § 16(b). *See also,* H. R. Rep. No. 422, April 1955, 84th Cong. 1st Sess. 2 (1955), which states as follows:

> "It further provides that while the period in which to bring a private treble damage action shall in no case be less than 4 years, nevertheless, in instances where a private suit is tolled because of the pendency of a Government proceeding private treble damage actions must be instituted within 1 year after the termination of the Government's case if, at the end of such period, 4 years or more shall have elapsed since the cause of action accrued. *This requirement is designed to prevent interminable delay and congestion of court calendars as well as encouraging the prompt adjudication of private damage suits.*" (Emphasis added).

District Court to determine that the action cannot be maintained as a class action. Upon a determination by the District Court that there is not a proper class action, members of the non-class are free to bring separate actions of their own or to move to intervene in the original action. Assuming, for example, that the applicable statute of limitations would have run one month after the filing of the class action, under the Ninth Circuit's decision, the would-be class members of the non-class have a month following the final negative determination regarding the class action in which to file their complaints or motions, even though a year or more may have passed since the original complaint was filed.

It is respectfully submitted that the decision of the Court of Appeals is clearly erroneous because it negates the policy of repose underlying Section 5(b) of the Clayton Act and subverts the procedural aspects of Rules 23 and 24, F.R.Civ.P. Clearly the Court of Appeals was not justified in "nullifying or watering down any of the procedural safeguards established * * * by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23 * * *."[83]

It follows that this Court should vacate the judgment of the Court of Appeals dated January 31, 1973, which reversed the order of the District Court denying Respondents' intervention pursuant to Rule 24(b),

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[83] *Eisen v. Carlisle*, ATRR No. 62, 5/8/73, F-1-F-4 (2nd Cir. Op. May 1, 1973).

F.R.Civ.P. It is respectfully submitted that this Court should issue its mandate directing reinstatement of the aforesaid order of the District Court.

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